

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

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74-2682

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-2682

LAWRENCE D'ALLESANDRO,
Petitioner-Appellee,
—against—

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR RESPONDENT-APPELLANT

DAVID G. TRAGER,
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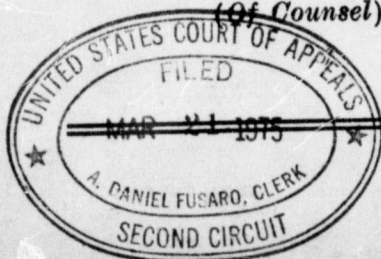




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Docket No. 74-2682

LAWRENCE D'ALLESANDRO,
Petitioner-Appellee,
—against—

UNITED STATES OF AMERICA,
Respondent-Appellant.

REPLY BRIEF FOR RESPONDENT-APPELLANT

Preliminary Statement

On February 7, 1975, the United States filed its brief in this case seeking review of an order of the district court which granted the defendant's motion pursuant to 28 U.S.C. § 2255 to vacate a judgment, entered upon his plea of guilty, convicting him of distributing heroin in violation of Title 21, United States Code, Section 841. The appeal is based on our submission (1) that there was no legal basis for the order vacating the judgment of conviction; (2) that there was no factual support for the district court's finding "as a matter of fact that the sentence was invalid because the plea was not properly taken"; and (3) that the district court's order was a transparent attempt to usurp the powers of the Board of Parole and overcome the limitations placed upon its power to reduce sentence by F. R. Crim. P., Rule 35.

The brief filed by petitioner-appellee all but concedes that there was no defect whatever in the procedure by which the original plea was taken, and accordingly, no basis to vacate the plea on that ground. Instead, petitioner—who was represented during the proceedings below by able counsel—now suggests for the first time that he was not seeking to vacate his sentence and plea pursuant to Section 2255, as he originally stated in his pro se application, but that his was a motion pursuant to Rule 32(d) to vacate his plea in order to correct “manifest injustice”.

Petitioner's half-hearted defense of the district court's action on this ground is that “where an essential part of a defendant's plea is a promise by the Government that it will dismiss a criminal prosecution against that defendant's mother, the plea becomes inherently suspect” (Br. 19). This claim was never asserted below as a basis for relief. Moreover, at the time of the plea, Judge Weinstein was careful to inquire whether the petitioner was pleading guilty “because you think you are guilty or because you want your mother to get off.” The defendant responded: “Not because of that, because I am guilty” (App. 42).

Under these circumstances, it is understandable that the principal thrust of petitioner's brief is directed to an effort to insulate the order of the district court from any appellate scrutiny; for it is plain that our submission—that the order was nothing less than a transparent device designed to evade the provisions of F. R. Cr. P., Rule 35—is supported by everything that was said and done below.¹

¹ While we have detailed those proceedings in our principal brief, we overlooked a crucial portion of the transcript which eliminates the slightest possible doubt about what was really transpiring. Thus, although the decision to vacate the plea was based on confusion in the colloquy at the time, Judge Weinstein, in accepting the second plea to the indictment after vacating the first plea, relied upon the exact colloquy in the transcript of the earlier plea (App. 101-102):

[Footnote continued on following page]

We proceed now to our response to petitioner's strained effort to insulate the order below from appellate review on the grounds (1) that it should be treated as an order pursuant to F. R. Cr. P., Rule 32(d), from which petitioner argues an appeal may not be taken; and (2) that the Double Jeopardy Clause bars an appeal from the order.

ARGUMENT

I. The Order of the District Court was not entered pursuant to F. R. Cr. P., Rule 32(d) and it is appealable

The petitioner argues that "his *pro se* 2255 application" to the district court asking that his plea be vacated "does not mean that this was a civil proceeding in which the Government has a general right to appeal" (Br. 7), but that "this letter was simply another step in the criminal proceeding from which the Government has no appeal." Although petitioner concedes that, "at least on the surface" his claim is not "supported by the record" (Br. 7), and that the district court treated his application "as a civil action to set aside his conviction (App. 62)", this is not determinative of the matter because (1) "the relief requested here, could well have been afforded pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure", which permits a district court to vacate sentence "to correct manifest injustice", and (2) in the context of this case "there is no practical distinction between the relief available under Section 2255 and that available under 32(d)." The only relevant distinction, petitioner suggests, is "the fact that the Government cannot appeal from an Order pursuant to Rule 32(d)."

"THE COURT: Have you read the transcript of the prior inquiries that I made to you on the prior plea?

THE DEFENDANT: I don't—yes, your Honor, yes.

THE COURT: Well, it has been stipulated by defendant and his counsel the answer would have been the same if those questions were repeated.

MR. LA ROSSA: Yes, sir."

The premise upon which this argument rests is erroneous, because the relief requested here could *not* properly "have been afforded pursuant to Rule 32(d)", and that is presumably why neither the district court judge nor the defendant's counsel relied on it. Moreover, it is submitted that an appeal does lie from an order granting a motion *after* sentence to vacate a plea, pursuant to Rule 32(d) because it necessarily involves a "collateral" attack on the judgment of conviction no different than that involved in a Section 2255 motion.

First, although there is no express time limit during which a motion to withdraw a plea must be made, such a motion must be made within a reasonable time. *Oksanen v. United States*, 362 F.2d 74, 79 (C.A. 8, 1966). Cf. *United States v. Washington*, 341 F.2d 277, 286 (C.A. 3, certiorari denied, 382 U.S. 850 (1965)). The reason for this is that "delay casts doubt on the good faith of the motion" (8A Moore, Federal Practice ¶ 32.07, p. 32-111), and seriously prejudices the ability to retry a defendant (Note, *Postrelease Remedies for Wrongful Conviction*, 77 Harv. L. Rev. 1615, 1616 (1961)). Moreover, in eliminating the ten day period in which such motion had to be made under prior practice, the Supreme Court, and the Advisory Committee, could hardly have intended to permit conviction based on guilty pleas to remain vulnerable to motions of this kind for a longer period of time than similar motions addressed to convictions based upon jury verdicts. Compare, F. R. Crim. P., Rule 33.

Here considering the nature of petitioner's claim, that "I never plead guilty to the crime which I am incarcerated for" (App. 63), the delay of a year and a half is completely unreasonable. Moreover, any doubt as to the bad faith of the application and its real purpose, was eliminated by defendant's counsel who advised Judge Weinstein that "Mr. D'Allesandro most probably has taken the position that he's

taken here because of the problems that we're having with prison authorities [in obtaining parole]" (App. 88-89).

Second, it is settled law in this Circuit that in order for a defendant who has pleaded guilty and been sentenced to have his plea vacated pursuant to Rule 32(d), he "must at the very least allege that he was not guilty of the charge to which he pleaded". *United States v. Norstrand Corp.*, 168 F.2d 481 (C.A. 2, 1948); see also, *United States v. LoDuca*, 274 F.2d 57, 59 (C.A. 2, 1960); *United States v. Paglia*, 190 F.2d 445, 447-448 (C.A. 2, 1951); *United States v. Blauner*, 337 F. Supp. 1394 (S.D.N.Y. 1971). As Chief Justice Burger wrote when he sat on the Court of Appeals of the District of Columbia Circuit, "under a Rule 32(d) claim, unlike the consideration of a petition under Section 2255, the guilt or innocence of the petitioner is controlling". *Watts v. United States*, 278 F.2d 247, 251 (C.A.D.C., 1960); *Smith v. United States*, 324 F.2d 436, 440 (C.A.D.C., 1963). Compare, Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U. Chicago Law Review 142 (1970).

Thus it is apparent, contrary to petitioner's claim, that there are critical differences between an application pursuant to Section 2255, and an application pursuant to Rule 32(d). Moreover, because no relief pursuant to Rule 32(d) was asked for, because the judge did not treat petitioner's application as a Rule 32(d) motion, and because the petitioner's moving papers were not seasonably filed and failed to make out any case for such relief under Rule 32(d), his application should not now be treated as such a motion. See *United States v. LoDuca*, *supra*, 274 F.2d at 59.

Finally, even if one assumes that there is no difference between a motion pursuant to Rule 32(d), and a motion pursuant to Section 2255, it does not follow an order pursuant to Rule 32(d) should be held to be unappealable under 28 U.S.C. § 1291, particularly where that motion is

made after sentence and necessarily involves a "collateral" attack on the judgment of conviction similar to that permitted by Section 2255. An order entered pursuant to Section 2255 is not deemed to be a proceeding in the original criminal prosecution but is regarded as an independent civil suit (*Heflin v. United States*, 358 U.S. 415, 418, n. 7 [1959]; *United States v. Hayman*, 342 U.S. 205, 209, n. 4 [1952]; *McGann v. United States*, 352 U.S. 904 [1956]), even though (like a post-judgment Rule 32(d) motion) it is filed in "the same court where the defendant was originally convicted * * * and [t]he hearing on the motion and the matter is determined by the same trial judge who had heard the original criminal cause and who had entered the original judgment of conviction".² If an order terminating such a proceeding is appealable, then why should not the Rule 32(d) motion (made after the entry of a judgment of conviction) be treated similarly.

While we recognize that the cases cited by respondent suggest a contrary result, there is no reason in logic or policy for such a difference. The only basis for distinguishing between the two for appellate purposes would be the scope of review available. Because a Rule 32(d) motion is largely discretionary, the scope of review might be narrower than where relief is afforded on strictly legal grounds. Under any standard, however, the district court's order here must be set aside for it is nothing but a transparent device to avoid the provision of F. R. Crim. P., Rule 35.

² *United States v. Shapiro*, 222 F.2d 836, 839 (C.A. 7, 1955). The only difference of course is that a rule 32(d) motion is docketed "under the same criminal case number" (222 F.2d 836). But, that fact is hardly consequential; and, in any event, here there was a separate civil docket number.

II. The appeal here would not violate the double jeopardy clause

Respondent also contends that this appeal is barred by the Double Jeopardy Clause because after the original guilty plea was vacated, he plead guilty again and that "[u]pon such conviction, jeopardy attached", and that to vacate the sentence then imposed upon him "would violate the Fifth Amendment prohibition against placing a defendant "twice in jeopardy."³ This claim, although superficially appealing, is without merit. Just as the word acquittal "has no talismanic quality for the purpose of the Double Jeopardy Clause", *Serfass v. United States*, — U.S. —, March 3, 1975 (16 Cr. L. Rep. 3083), so the invocation of the word "conviction" does not put an end to rational analysis.

The Double Jeopardy Clause is intended to protect a person who has been acquitted or convicted from being tried and punished a second time for the same offense. "Where a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried and sentenced for the same offense." *United States v. Wilson*, — U.S. —, February 25, 1975 (16 Cr. Law Rep. 3071). We do not, however, seek to subject the petitioner to double punishment for the same offense; we seek the reinstatement of the only punishment that was validly imposed. This involves no more a violation of the Double Jeopardy Clause than the correction of a sentence which is legally defective. See *Bozza v. United States*, 330 U.S. 160 (1947).

Moreover, there are no considerations of fairness or finality which would be violated by permitting this appeal.

³ We, of course, do not seek to vacate the sentence then imposed; although we would not oppose a motion by the petitioner to vacate that sentence, if we are successful on this appeal.

For here, it was the defendant who made a patently frivolous motion, in order to circumvent the limits on the district court's power to reduce sentence. Having persuaded the district court to become a participant in this scheme, and knowing that the order vacating the original sentence was appealable, the defendant again plead guilty to the charge, secure in the knowledge that his period of confinement would be reduced to time served. In so doing, he should be deemed to have taken the risk that the original sentence would be reimposed following a successful appeal.⁴

This is not a case like that posed by petitioner (Br. 16), where, after vacating the plea, the district court had ordered that "the case proceed to trial and that trial resulted in acquittal." Under those circumstances, the United States would have had the option to elect to try the case, and if it did—without taking an appeal from the order vacating the judgment of conviction—then "principles of fairness and finality" should preclude an appeal after a subsequent acquittal. Here, however, there was only one count of the indictment outstanding, and no affirmative act on the part of the United States was required to place the petitioner in jeopardy. The decision to place himself in jeopardy—if jeopardy it was in any realistic sense—was made by the defendant alone, and it was for the obvious purpose of obtaining an advantage contrary to law. The

⁴ The petitioner complains that the Assistant United States Attorney, no doubt dumbfounded by what was transpiring, did not object when he entered his plea of guilty. But, since there was only one count of the indictment outstanding, the Assistant United States Attorney had no legal basis for objecting, and the district court made it quite clear that nothing would deter him. What is significant, however, is that the Assistant United States Attorney clearly indicated that appellate review was contemplated.

Double Jeopardy Clause was never intended to insulate such conduct from the scrutiny of appellate review.⁵

CONCLUSION

The judgment of the district court should be reversed.

Dated: March 18, 1975.

Respectfully submitted,

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(Of Counsel).

⁵ Compare *Serfass v. United States*, *supra*, 16 Cr. Law Rep. 3083, where the Supreme Court left open the issue whether an appeal would lie from a post jeopardy order dismissing an indictment on the merits, where "a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to the trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense. Compare *United States v. Findley*, 439 F.2d at 973, with *United States v. Pecora*, 484 F.2d 1289, 1293-1294 (C.A. 3, 1973). See *United States v. Jenkins*, 490 F.2d 868, 880 (C.A. 2, 1973), *aff'd*, — U.S. — (1975)." The instant case involves a similar effort to misuse the protection afforded by the Double Jeopardy Clause. Cf. *United States v. Moon*, 491 F.2d 1047 (C.A. 5, 1974).

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 21st day of March 1975 he served a copy of the within

Reply Brief for Respondent-Appellant

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.

522 Fifth Avenue

New York, N. Y.

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

21st day of March 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4301966
Qualified in Kings County
Commission Expires March 30, 1975